RESPONDENT'S BRIEF IN SUPPORT OF ANSWER.

Because the charges which Petitioner makes concerning the good faith of the Supreme Court of Illinois, his treatment Car PTX 4741 and of the admissions filed by Respondent and the unwarranted inferences which he draws from the record, we burden the court with a complete review, particularly of the controverted matters.

THE EVIDENCE.

Petitioner was 22 years old on January 18, 1942. He had the benefit of an eleventh grade education in school. Before entering respondent's employ he had worked at various jobs, including that of a laborer, earning $10.00 to $20.00 per week, at Camp Robinson, Arkansas, and milk wagon driver earning $85.00 per month at Little Rock. In May, 1940, he married (R. 12). His father, Gus Avance, had been employed by the respondent since 1907 and was employed by respondent at the time of the trial (R. 51). His father-in-law, W. C. Robertson, had been employed by respondent for about twenty-five years, and at the time of the trial had been recently promoted and was still employed by it. He was the fireman of the crew with which petitioner was working at the time of the accident (R. 39).

Having made application and about twelve student trips for instruction, petitioner on May 28, 1941, started work for respondent as a brakeman operating out of Poplar Bluff, Missouri (R. 12).

On January 16, 1942, petitioner was assigned to make the freight run from Poplar Bluff, Missouri, to Bismarck, Missouri, about 75 miles, and return. On it the crew left Poplar Bluff in the morning, reaching Bismarck between 2 and 3 p. m. The return trip was to be made the next day (R. 12-13).

The crew's work was to switch the yard at Bismarck (R. 14), make the M. & I. (Missouri-Illinois) delivery (R. 20), and make up their train to be hauled to Poplar Bluff (R. 39-40) (R. 30).

The M. & I. delivery of twenty to thirty cars was completed about 9 a. m. and, as the crew thereafter proceeded with its work, petitioner's accident occurred. In the yards a track known as the lead track ran in a northerly-southerly direction. The coal chute track branched off of the lead track (see Pl. Ex. 1, R. 62). As its name indicated, the coal chute track was used to supply the coal chute with coal, and standing on it at a point northwardly from its junction with the lead track were, in order, two loaded coal cars and then three empty coal cars. It was desired to remove the three empty coal cars so that they could be put over in the yards (R. 30), and then spot the loaded cars on the coal chute track. At the time the engine was headed south and was just south of the coal chute switch. It had hold of two box cars and a tank car which it had brought back from the M. & I. connection. It backed these cars into the coal chute track, coupled onto the two loaded coal cars and proceeded backwards until it had coupled onto the three empty coal cars. Then it returned southwardly off of the coal chute track, past the switch, and drew the entire cut of cars onto the lead track (R. 39-40).

The next move was to shove the entire cut northwardly so that the three empty coal cars would be in the clear of the switch point. It was during this movement that the accident occurred.

THE ADMISSIONS.

In apt time petitioner moved that respondent produce a large number of documents, among other things, including "all bills of lading, documents and reports of every

nature and description," etc., covering all cars handled by respondent's train crew on day of the accident (R. 4-5).

As the bills of lading go to destination with the cars and many of the records are not kept at the Bismarck yard, petitioner's request manifestly could not be complied with without great effort and time. On November 6, 1942, the court allowed petitioner's motion ordering respondent to comply within fifteen days (R. 9). On November 20, 1942, respondent filed the admissions (R. 29) which petitioner now assails.

Apparently petitioner was then satisfied with the respondent's admissions as being a satisfactory compliance with the order, for the parties were in court on November 25, 1942 and December 4, 1942, on other motions (R. 9) and on neither occasion was the now alleged failure of respondent to comply brought to the court's attention.

In this connection Rule 17 (10) of the Illinois Rules of Practice, 370 Ill. 24, provides that an order to produce entered thereunder shall operate to stay all proceedings until complied with or vacated. Clearly nothing could be done by respondent in the cause until he had satisfied petitioner.

By the time the case went to trial, respondent had secured a portion of the documents and at petitioner's request made them available to him. At Record page 24, petitioner's counsel refers to the wheel report which we "gave" him. Also on the same record page, petitioner's counsel asked that the record show Petitioner's Exhibit 6 "was given us by counsel" for the respondent, and we referred to "all papers" having been "voluntarily" furnished by us.

To comply with the order of the court would have put the respondent to great labor, trouble, expense and substantial time must necessarily have been used to collect the documents.

The petitioner was satisfied with the admissions. He accepted the admissions as a compliance with the order.

Not once during the trial did petitioner suggest there should have been a further compliance.

The situation is not one where he has been mistreated and is not within the cases referred to by petitioner.

CAR P.T.X. 4741.

In his petition (page 16), petitioner says "Train Number 93 entered the State of Missouri from the State of Illinois at Ste. Genevieve"; and, in his typewritten jurisdictional statement (page 3), petitioner says: "It was admitted that P.T.X. 4741 was then being hauled and moved and switched on its journey to Arkansas"; and charging that the Supreme Court of Illinois "misrepresented the history of P.T.X. 4741 and its billing" (Jurisdictional Statement, p. 11).

We say the court correctly understood and stated (R. 83-4) the facts in connection with this car.

Car P.T.X. 4741 was delivered to respondent at Bismarck, Missouri, by Train 93 of the Missouri-Illinois Railroad Company. In the courts below, petitioner contended the Missouri-Illinois Train 93 with car P.T.X. 4741 had come from Illinois into Missouri and the Appellate Court so stated. (See 320 Ill. App. 406, p. 413.) Such we suggest is not the fact and certainly the jury might have found differently, for Conductor Maddox testified:

> "Q. What is train No. 93? A. That is the M. & I. train that comes in from Ste. Genevieve.
> Q. It comes in from the State of Illinois? A. From Ste. Genevieve, Missouri" (R. 25).

Conductor Maddox testified Train 93 came from Ste. Genevieve, Missouri, to Bismarck, Missouri. Neither he nor anyone else testified this train originated in Illinois. Neither did he nor anyone else testify as to where any of the cars, including Car P. T. X. 4741, originated. They

might have originated at Ste. Genevieve or from any point in Missouri between Ste. Genevieve and Bismarck.

Rule 38 (1) of this Court states that petitioners for writs of certiorari shall here file a certified transcript of the record in the case. At the time we filed our typewritten answer to the Petitioner's typed jurisdictional statement, we did not know it had become the practice to treat, as a compliance with the rule, the filing of a certified copy of the printed abstract of the record in the court below.

In the Supreme Court of Illinois the controversy raged as to whether Train 93 "entered the State of Missouri from the State of Illinois at Ste. Genevieve, Missouri" (p. 16). The Petitioner there so charged (see certified copy of excerpt from his brief in the Supreme Court of Illinois, filed by us in this cause) and cited abstract pages 34, 34a, in support of his assertion. This Respondent had denied in his brief (see filed certified copy of excerpts from his brief in the Supreme Court of Illinois), and we referred to the pertinent pages of the record of the Circuit Court on file with the Supreme Court of Illinois. Pages 115 to 121, inclusive, of the transcript of the record in the Supreme Court of Illinois have also been certified. They cover pages 34 and 34a of the abstract of the record appearing at printed record page 25.

An examination of the matters so certified will disclose there is not the slightest shred of evidence therein which would permit and certainly none which would require a jury to conclude that Train No. 93 or any of the cars which it brought into Bismarck originated in Illinois; and this part of the record was specifically brought to the attention of the Supreme Court of Illinois.

References to the Rules of the Appellate and Supreme Courts of Illinois concerning the records of the trial court required to be filed are printed as an appendix to this brief.

Concerning car P. T. X. 4741 (an empty tank car) we

have urged and still urge that there is no evidence it had come into Missouri from Illinois, or was, at 9:15 a. m., January 17, 1942 (Complaint, Rec. 2), the time of the accident, then billed or assigned to any point outside of Missouri. It is true car P. T. X. 4741 at 10:50 a. m. on said date (Rec. 65, Petitioner's Exhibit F, cont'd) left Bismarck, Missouri, with the train of which petitioner would, but for the accident, have been a crew member, assigned to a point in Arkansas; yet the time when it was so assigned or billed does not appear in the evidence.

In his Jurisdictional Statement (pp. 2-3) petitioner says that at the time of the accident the engine was attached to and hauling P. T. X. 4741, "which was being taken from the other railroad company to be placed in the train and which left Bismarck approximately one hour after the accident, consigned to Texarkana, Arkansas." This is solely his conclusion from the evidence, which, most favorably considered for him, did no more than raise a jury question on the point. There is no evidence in the record as to time, prior to the departure of the train, when Car P. T. X. 4741 was assigned or billed or designated to travel from Bismarck, Missouri, to Texarkana. In peremptorily instructing the jury on the point, the trial court was not warranted in concluding such assignment occurred prior to the accident, even though a jury would have been warranted in drawing such a conclusion.

Petitioner is in error when he states (p. 15) that admittedly some of the cars switched prior to the accident were interstate. The stipulation does not, with reference to the happening of the accident, fix the time of the switching. Referring to car P.T.X. 4741, petitioner states, "At the time of the accident this interstate car was being hauled and moved by the engine" (p. 15). There is nothing in the record to indicate the car was doing anything other than drifting without specific assignment until over an

hour after the accident when it left Bismarck consigned to Arkansas. When it was so assigned does not appear in the record.

Petitioner's assumption that the Missouri and Illinois delivery had not been completed before the time of the accident is also unwarranted, as the testimony was that the crew had already returned to the Missouri Pacific yards and were engaged in a new task of setting out empty coal cars from the coal chute track (R. 15, 30 and 40).

On page 15 of his printed petition petitioner asserts that between 7 and 9 o'clock the crew "had placed a number of cars in their train on track 7 before the accident occurred" and "admittedly some of these cars were interstate." The statement that some of these cars were interstate is not borne out by the record. Car P.T.X. 4741 was the only interstate car which went out with respondent's train (R. 25, 65) and, as heretofore pointed out, there is no evidence as to when it was assigned or billed or designated as a part of that train. The "admissions" did not differentiate between cars handled before and after the accident.

We suggest therefore there is no fair basis for questioning the correctness of the description of the facts by the Supreme Court of Illinois or the bona fides of its decision.

II.

Concerning the Finality of a Judgment Within the Meaning of Sec. 237 (b) of the Judicial Code.

This Court has uniformly held that a judgment of the highest State Court reversing a case and remanding it for a new trial is not a final judgment.

Houston v. Moore, 16 U. S. 433, 434;
Brown v. Bank, 4 Howard 465, 466;
Tracy v. Holcombe, 24 Howard 426;
Johnson v. Keith, 117 U. S. 199;
Bruce v. Tobin, 245 U. S. 18, 20.

Where a State Court of last resort reverses and remands a case for further proceedings the judgment is not final.

Winn v. Jackson, 25 U. S. 135;
St. Clair County v. Lovingston, 18 Wallace 628, 629;
Parcels v. Johnson, 20 Wallace 653;
Zeller v. Switzer, 91 U. S. 487;
Davis v. Crouch, 94 U. S. 514;
Rice v. Sanger, 144 U. S. 197;
Haseltine v. Bank, 183 U. S. 130, 132.

Where the question before the State Court was on the pleadings, a judgment reversing and remanding the case was not considered final for the reason that the pleadings could be amended and an entirely different case presented on a second appeal.

Meagher v. Minnesota T. M. Co., 145 U. S. 608, 611;
Clark v. Kansas City, 172 U. S. 334, 337;
Missouri and K. I. R. Co. v. Olathe, 222 U. S. 185, 186;
McComb v. Commissioners, 91 U. S. 1;
Schlosser v. Hemphill, 198 U. S. 173, 175;
Bostwick v. Brinkerhoff, 106 U. S. 3;
Louisiana Nav. Co. v. Oyster Comm., 226 U. S. 99, 101;
Great West. Telegraph Co. v. Burnham, 162 U. S. 339, 342.

A similar rule has been followed in equity cases where the Court of last resort has reversed the decree of the lower Court and remanded for a new trial.

Pepper v. Dunlap, 5 Howard 51;
Moore v. Robbins, 18 Wallace 588.

The judgment or decree, to be final, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance by the United States Supreme Court, the Court below would have nothing to do but to execute the judgment or decree it had already rendered.

Bostwick v. Brinkerhoff, 106 U. S. 3, 4;
Mower v. Fletcher, 114 U. S. 127, 128.

Where by the judgment of the reviewing Court, the rights of the parties are decided and the lower Court is directed to perform some ministerial act which will terminate the litigation, then such a judgment is final.

Board of Commissioners v. Lucas, 93 U. S. 108;
Mower v. Fletcher, 114 U. S. 127, 128;
North Carolina R. Co. v. Story, 268 U. S. 288, 297;
Rio Grande Western R. Co. v. Stringham, 239 U. S. 44, 47;
Department v. Pink, 317 U. S. 264, 267.

Similarly it has been held that a judgment that a party was entitled to condemn certain lands, but remanding the cause for assessment of damage and compensation was not a final judgment for purposes of a writ of error.

State of Washington v. Superior Court, 243 U. S. 251, 257.

Or where the judgment of the State Court has definitely fixed rights and liabilities, but has remanded the case to the trial court to fix the amount of the recovery.

Bruce v. Tobin, 245 U. S. 18, 19.

The foregoing decisions clearly demonstrate the settled law in this Court. Judgments are not final so long as some judicial, as distinguished from a merely ministerial, act remains to be done in the State Courts.

Petitioner contends that, for practical purposes, this judgment is final and argues that under the rule of stare decisis said to obtain in Illinois, the Courts of that State are forever precluded from considering whether petitioner is under the F. E. L. A. as a matter of law.

But quite apart from the foregoing considerations, this Court, in testing a judgment for finality, is not guided by nor conceived with any limitations of appellate review imposed by State Courts on themselves, i. e.:

> "Nor is it material that the State Supreme Court regarded itself as bound by the decision in the former appeal as the law of the case and declined, in the judgment now under review, to again consider the question. The judgment under review was the only final judgment in the appellate court of the state from which plaintiff in error could prosecute a writ of error, and, until such final judgment, the case could not have been brought here for review. Schlosser v. Hemphill, 198 U. S. 173, 49 L. ed. 1000, 25 Sup. Ct. Rep. 654, and cases therein cited."
>
> Chesapeake and Ohio Railway Company v. McCabe, 213 U. S. 207, 214.

More recently this Court has said:

> "We are not unmindful of the ruling of the appellate court to the effect that the issues were, in fact, disposed of on the first writ of error, and its powers brought to an end; but, whatever may be the view of that court in respect of its own power to again consider the issues, the judgment now under review

is the only one this court can consider as final, for the purpose of exercising its appellate jurisdiction."

Georgia Railway & Power Co. v. Decatur, 262 U. S. 432, 438.

See, also:

Great Western Telegraph Co. v. Burnham, 162 U. S. 339, 345.

By a facile exposition of decisions of this Court, Petitioner has sought to evolve a rule which will give special consideration to the "special circumstances of this particular case" (Petition and Brief p. 6). To do so he first challenges the integrity of the Supreme Court of Illinois and then puts an interpretation on the language of opinions of this Court which they will not bear.

For example, Clark v. Williard, 292 U. S. 112, does not abandon the rule of Haseltine v. Bank, 183 U. S. 112. The rule simply is that where the judgment of the State Court, as here, refers to the Court's opinion, this Court may consider the opinion as a part of the "face of the record" as that term has been used. In the Clark case the requisite finality had been reached as to the cause under consideration there.

Department v. Pink, 317 U. S. 264, is cited. The quoted portion of the opinion (Brief p. 8, 317 U. S. 268) says in effect that the record of the State Court will be examined, and if, under the state law, it is found the litigation was ended between the parties and there could be no further review, then the judgment will be regarded as final. It is apparent that the judgment there being considered was final, but the petitioner had failed to petition for certiorari within the three-month limitation. There is nothing decided in the Pink case which overrules or even questions the long line of cases defining a final judgment, nor which in any way limits the doctrine as first announced and consistently followed by this Court.

The cases cited in the Answer demonstrated that when, in 1925 (as it had done many times before), Congress re-enacted the Judicial Code and in Sec. 237 (b) used the words "final judgment" as being the judgments of state courts here subject to review on certiorari, the Congress used the words with the interpretation, application and meaning which this Court in numerous unquestioned decisions extending over one hundred years had given to them. In substance, petitioner's argument is that Congress should change the law.

We respectfully submit he is entitled to no relief under the law or on the merits of his petition.

GUY A. THOMPSON,
Trustee, Missouri Pacific Railroad Company,
a Corporation,

By JOSIAH WHITNEL,
510-17 First Nat'l Bank Building,
East St. Louis, Illinois,
Attorney for Respondent.

Of Counsel:

T. T. RAILEY,
Missouri Pacific Building,
St. Louis, Missouri.

PHILIP G. LISTEMAN,
510-17 First National Bank Building,
East St. Louis, Illinois.

LLOYD MIDDLETON,
510-17 First National Bank Building,
East St. Louis, Illinois.